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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SANTOS GONZALEZ, et al.,

Plaintiffs and Appellants,

v.

COUNTY OF KERN,

Defendant and Respondent.

F078306

(Super. Ct. No. BCV-17-100040)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Stephen D. Schuett, Judge.

Century Law Group and Karen A. Larson for Plaintiffs and Appellants.

Hogan Law, Michael M. Hogan; Margo A. Raison, County Counsel, and Andrew C. Thomson, Deputy County Counsel, for Defendant and Respondent.

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Appellants Santos Gonzalez and Patricia Serna, who are married (together Gonzalez), and Jose Sanchez and Aracely Sanchez, who are also married (together Sanchez), each own real property in Rosamond, Kern County. Appellants together filed suit against Kern County (Kern); RE Astoria, LLC (Astoria); and First Solar Electric (California), Inc. (First Solar) alleging several causes of action pertaining to Astoria's

construction of a 2,000-acre solar energy project (the project) near their properties. Appellants' fourth amended complaint (the complaint) included a cause of action for inverse condemnation against Kern only, and this was the only cause of action brought against Kern.

Appellants' inverse condemnation claim alleges that, although Astoria built the project and contracted with First Solar for construction services, Kern substantially participated in the project's planning and approval, and the project has substantially harmed their properties. The trial court sustained Kern's demurrer to the complaint on the grounds the complaint did not contain sufficient allegations (1) that the project was a public use or improvement for inverse condemnation purposes or (2) that Kern's activities regarding the project were a proximate cause of the harm to appellants' properties. A judgment of dismissal of the complaint as to Kern was thereafter entered, from which appellants appeal.

On appeal, appellants contend they have adequately pleaded a cause of action for inverse condemnation against Kern. We agree, and reverse the judgment of dismissal.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Because this case comes to us after the sustaining of a demurrer, we accept as true the well-pleaded allegations in the complaint. (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 173 (*Czajkowski*).) We also consider matters that are judicially noticeable. (*Ibid.*) Thus, the following facts are drawn from the complaint's allegations as well as from matters the trial court judicially noticed.

Appellants Gonzalez purchased a certain parcel of land in Rosamond, Kern County, jointly as a married couple, in 2011. Appellants Sanchez purchased 100 acres of land that is divided into three parcels in Rosamond, Kern County, jointly as a married couple, in 2006.

At some time, Kern "recognized the public demand for cheap energy on a reliable basis." Additionally, the California Global Warming Solutions Act statutorily requires

Kern to reduce emissions by 2020 "and to increase its energy for its citizens." Kern also recognized "the need to convert it resources including vast undeveloped flat lands, access to sun, and public easements into a reliable source of revenue."

Astoria is an international company constructing solar projects. At some point, Astoria "entered into a Memorandum of Agreement with Kern" for the construction of a "mutually beneficial 2,000-acre solar project in Kern."[1] Astoria and Kern agreed the project would "serve a public use and provide a public benefit" because it would generate energy for over 40,000 Kern County residents "on a reliable and less costly basis" and "provide Kern with millions of dollars of revenue on a reliable and continuous basis" as the generated electricity could be marketed to various power utility companies. Kern and Astoria described the project on their respective websites "as a major public project to be developed in four phases for the benefit of many residents."[2]

Kern recognized the project was compatible and consistent with the goals and policies listed in the "Energy Element of the Kern County General Plan." Specifically, the project would further Kern's policy of encouraging domestic and commercial solar energy uses to conserve fossil fuel and improve air quality, and furthered Kern's goal of positioning Kern as "a leader in energy production." Kern also noted the project is near Kern's existing utility transmission and infrastructure, thereby requiring minimal off-site improvements or impacts.

Kern "substantially participated" in the planning and development of the project in several ways. With respect to the preparation of an Environmental Impact Report (EIR) in compliance with the California Environmental Quality Act (CEQA), Kern did the following: (a) designated its Planning and Community Development Department as the

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[1] This purported Memorandum of Agreement is not part of the record.

[2] The complaint does not allege Kern owns an interest in the project or that Kern paid any money for the planning, construction, or future operation of the project.

lead agency to draft the EIR; (b) prepared and authorized the EIR; (c) prepared and issued several Notices of Preparation from years 2014 to 2016 advising property owners and other governmental agencies; (d) held public meetings and considered the input of participants; and (e) certified the final draft of the EIR.[3]

Regarding the project's public benefits, the complaint alleged:

> "29. KERN concluded in public documents and at meetings at which the PROJECT was discussed that the ASTORIA PROJECT is a public use and provided a major public benefit for KERN'S residents by providing, *inter alia,* the following public benefits:
>
> "(a). It would establish solar facilities and solar storage facilities large enough to produce and store a reliable and renewable source of electricity to the public in an economically feasible and commercially financeable manner that could be marketed to different power utility companies;
>
> [¶] … [¶]
>
> "(c). It would result in emissions reduction by 2020 as required.
>
> "(d). It would comply with the County's requirements for increasing energy use.
>
> [¶] … [¶]
>
> "(g). It would use largely undeveloped land including that owned by KERN for the public benefit.
>
> "(h). It would provide revenue."

Kern concluded in the final EIR that but for a few "scattered residences" the project would have a minimal impact since it would be constructed in a largely undeveloped area. The final EIR contained mitigation requirements for certain factors identified as potentially having significant environmental impact unless mitigated, but the

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[3] The covers of several documents prepared pursuant to CEQA as well as the front pages of other documents, all of which were judicially noticed, say the "RE Astoria Solar Project" is "by RE Astoria LLC, RE Astoria 2 LLC, and RE Astoria 3 LLC." Also, a "CEQA Transmittal Memorandum" lists the project applicant as: "RE Astoria, LLC; RE Astoria 2, LLC; and RE Astoria 3, LLC."

EIR also stated the project would have some unavoidable "changes to the environment" that could not be mitigated. In the Notice of Determination, Kern stated the project in its approved form "will have a significant effect on the environment" and that mitigation measures were made as conditions of the project's approval.

The complaint further alleged:

> "34. KERN conceded that in approving the PROJECT the County would have to balance the benefits to the public at large, including 175 megawatts of power, reduction of emissions, construction and permanent jobs, increase of sales tax, revenue vs the negative impact the PROJECT would have on the property rights of a few.
>
> "35. But KERN deemed that the PROJECT as a whole served a public use with large benefit to the whole with possibly disproportionate negative impact on only a few.
>
> "36. KERN approved the PROJECT because it decided that the Project is a legitimate public use. To wit, the PROJECT concerned the whole community and promoted Kern's general interest in relation to a legitimate object of government: The PROJECT would provide its 40,000 residents a reasonably priced and reliable source of electricity and its tax base an annual source of revenue.
>
> "37. After approving the ASTORIA PROJECT and as demonstrative of the public use the project served KERN did all of the following:
>
> "38. KERN vacated all of its public easements across the 2000 acres to ASTORIA that it needed for the PROJECT.
>
> "39. KERN rezoned all of the land previously zoned agricultural to industrial commercial.
>
> "40. KERN approved major changes to KERN's General Master Plan and Zoning Ordinance exclusively for the PROJECT.
>
> "41. KERN granted 8 conditional uses to the PROJECT.
>
> "42. KERN approved five zone changes.

"43. KERN granted private easements to ASTORIA."[4]

Astoria contracted with First Solar for construction of the project. Also, "Kern and Astoria contracted with First Solar to mitigate conditions resulting from the construction and from the project." Construction has commenced on the project, and such mitigation has not been implemented. The construction activities have resulted in continuously present severe glare as well as an ongoing problem of "dust and air particle contaminants entering [appellants'] properties." The dust and dirt cover appellants' homes and clog their air conditioning systems and vents.

First Solar has also "stripped" over 2,000 acres of vegetation from around appellants' properties and leveled the land to drain towards the dirt roads that provide access to their properties. When it rains, the dirt roads become difficult to traverse, and emergency vehicles are not able to access the roads until they dry up in the spring season. The project has also obstructed the vistas from appellants' homes, which has "substantially and permanently changed the existing visual character of the landscape."

Appellants explain the project has permanently and negatively impacted appellants' properties by causing: a permanent glare, permanent erosion patterns resulting in road flooding and impassibility, a loss of vegetation, reduction of scenic vistas and loss of view, ongoing dust and release of toxic pollutants, invasion of privacy, a substantial loss in marketability of their properties, a diminution of the highest and best use of appellants' properties, and a concern for potential health problems including cancer. These negative impacts "would annoy and disturb a reasonable person."

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[4] "A conditional use permit is administrative permission for uses not allowed as a matter of right in a zone, but subject to approval." (*Sounhein v. City of San Dimas* (1996) 47 Cal.App.4th 1181, 1187.)

While the complaint alleged the project "would use" land "owned by Kern for the public benefit," it is unclear what percentage of the project was to be built on public land, if any. From these allegations, it could be that private easements were granted over public lands but the project itself is not located on public lands. However, we do not presume or infer the project is located on any public land.

Appellants have pleaded that the project, though a public benefit, has placed a "peculiar and substantial" burden on their properties as a result of their proximity to the project. Appellants have also pleaded that the burden placed on their properties is disproportionate to the burden placed on the public at large.

The complaint

Appellants' fourth amended complaint alleges five causes of action against defendants Kern, First Solar, and Astoria. The second cause of action for inverse condemnation was brought only against Kern, and this is the only cause of action germane to this appeal.

Kern's demurrer

Kern filed a demurrer to appellants' second cause of action for inverse condemnation on the ground the complaint fails to allege facts sufficient to constitute a cause of action. Specifically, Kern contended the complaint did not sufficiently plead the project was for a public use or benefit nor that Kern's environmental review and approval of the project proximately caused the alleged harm to appellants' properties. Additionally, Kern contended appellants' failure to challenge Kern's approval of the project in an administrative mandamus proceeding foreclosed appellants' inverse condemnation action. Finally, Kern urged the demurrer should be sustained without leave to amend.

After a hearing, the trial court sustained the demurrer without leave to amend. The trial court ruled:

> "a. The Fourth Amended Complaint does not allege facts sufficient to constitute a cause of action for inverse condemnation against the County because there is no cause of action for inverse condemnation where a complaint alleges that a public entity has only issued permits and approvals for a private development, the County's compliance with the California Environmental Quality Act (CEQA) did not convert the Astoria Project into a public use or improvement, and the benefits identified in the Statement of Overriding Considerations adopted by the County pursuant to

CEQA do not transform the Astoria Project into a public use or improvement for inverse condemnation purposes; and

"b. The Fourth Amended Complaint does not allege facts sufficient to constitute a cause of action for inverse condemnation against the County because it fails to allege facts showing the County's permitting activities were a proximate cause of the injury to the Plaintiff's property."

A judgment of dismissal was thereafter entered dismissing Kern as a party to the case, from which appellants appeal.

DISCUSSION

I. Background law

"Inverse condemnation, like eminent domain, 'rest[s] on the constitutional requirement that the government must provide just compensation to a property owner when it takes his or her private property for a public use.' [Citation.] Under the California Constitution, '[p]rivate property may be taken or damaged for a public use and only when just compensation … has first been paid to, or into court for, the owner.' (Cal. Const., Art. I, § 19.) As explained in *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368[ ], the phrase ' "or damaged" ' was added in 1879 to 'expand the circumstances in which a private property owner may recover when the state takes property for a public use, or when the state's construction of a public work causes damages to adjacent or nearby property' and to 'clarify that the government was obligated to pay just compensation for property damaged in connection with the construction of public improvements, even if the government had not physically invaded the damaged property.' " (*City of Los Angeles v. Superior Court* (2011) 194 Cal.App.4th 210, 220 (*City of Los Angeles*).)

"An inverse condemnation action … is an eminent domain action initiated by one whose property was taken or damaged for public use." (*Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 601 (*Pacific Bell*).) "A public entity is a proper defendant in an action for inverse condemnation if the entity substantially participated in the planning,

approval, construction, or operation of a public project or improvement that proximately caused injury to private property." (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 761 (*Arreola*).) "In other words, in inverse condemnation, the government is obligated to pay for property taken or damaged for ' "public use" ' or damaged in the construction of 'public improvements.' " (*City of Los Angeles, supra,* 194 Cal.App.4th at p. 221.) "A ' "public use" ' is ' " 'a use which concerns the whole community as distinguished from a particular individual or a particular number of individuals; public usefulness, utility or advantage; or what is productive of general benefit; a use by or for the government, the general public or some portion of it.' " ' (*Ibid.*)

Kern contends a private project or development cannot be considered a public use or improvement for inverse condemnation purposes unless a public entity "exercises some dominion and control over the project," and cites *DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329 (*DiMartino*) to support this proposition. However, *DiMartino* does not stand for the proposition that, in cases involving a private project, a public entity must exercise "dominion and control" over the project in order to be held liable in inverse condemnation. *DiMartino* instead provides a public entity can be liable in inverse condemnation if it substantially participates in the "construction, management or operation of [the private project] *or* … exercise[s] … dominion and control" over the project. (*Id.* at p. 340, emphasis added.) Thus, the exercise of dominion and control is an alternative basis for imposing liability when a public entity has not otherwise participated substantially in the construction, management, or operation of a private project.[5]

[5] Kern presented an additional case during oral argument, *Ruiz v. County of San Diego* (2020) 47 Cal.App.5th 504, regarding "dominion and control." That case, however, does not stand for the proposition that an inverse condemnation action involving a private project *always* requires a showing the public entity exercised "dominion and control" over the project. Rather, the relevant question in that inverse

The element of proximate causation for inverse condemnation is established if the plaintiff can prove " ' "a substantial cause-and-effect relationship which excludes the probability that other forces *alone* produced the injury." ' " (*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 559.) As such, "[a] public entity can be liable for inverse condemnation if the public improvement is a substantial cause of the injury, even if it is only one of several concurrent causes." (*Pacific Bell, supra*, 81 Cal.App.4th at p. 601, fn. 4.)

II. Claims of error

The tenor of the trial court's order sustaining the demurrer is that the complaint did not allege sufficient facts that the project was a public use and benefit or that Kern substantially participated in the project's planning, approval, construction, or operation. The trial court also determined the complaint failed to allege sufficient facts regarding how Kern's actions proximately caused the harm to appellants' properties. The trial court did not rule, and Kern has never asserted, the complaint did not sufficiently plead appellants' properties have been damaged.

We agree with appellants the trial court erred because appellants' complaint pleads sufficient facts to constitute a cause of action for inverse condemnation. The complaint plainly and sufficiently alleged the project was a public use and benefit, not because it was subject to a governmental environmental review and a permitting process, but

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condemnation case was whether the defendant county's described usage of a homeowner's privately owned storm drain pipe for over fifty years constituted "the requisite 'dominion and control' required to impliedly accept [an] offer of dedication" of the pipe that the county had rejected back in 1959. (*Id.* at p. 514.) The *Ruiz* opinion thus demonstrates the concept of "dominion and control" is only relevant when determining whether a public entity has impliedly accepted a private project. In our case, the plaintiffs' theory of liability is based on Kern's direct participation in the planning and development of the project and not on Kern's implied acceptance of the project, and therefore the concept of "dominion and control" does not govern our analysis.

because it was to provide cheaper, cleaner, and more reliable energy to 40,000 Kern residents and provide a revenue source for Kern, among other benefits.

The complaint also sufficiently alleged Kern's participation in the project went beyond the mere ministerial issuance of permits and approvals. Namely, the complaint alleges Kern entered into an agreement with Astoria for the provision of energy to 40,000 residents, amended its general master plan and zoning ordinance, vacated public easements, granted private easements, granted conditional use permits, and approved several zoning changes.

Additionally, the trial court's order demonstrates a misunderstanding of the element of proximate causation in the inverse condemnation context. The trial court faulted appellants for not sufficiently pleading a causal nexus between Kern's permitting activities and the harm to appellants' properties. However, this particular nexus need not be shown. Rather, the only causal nexus appellants needed to plead was the one between the project itself and the harm to their properties, and the complaint pleads ample facts regarding how the project has caused several forms of harm to their properties, including a substantial loss of marketability.

Finally, Kern raised as a ground in its demurrer appellants' inverse condemnation action was foreclosed by their failure to challenge Kern's approval of the EIR in a mandamus proceeding. The trial court did not rule on this ground when sustaining the demurrer, but Kern reasserts it here on appeal as an alternate ground for affirming the judgment of dismissal. However, as appellants' inverse condemnation action does not include or necessitate a challenge to the EIR, Kern's argument is misplaced.

We first address the sufficiency of the complaint to constitute a cause of action for inverse condemnation. We then address Kern's separate argument regarding the purported need for a mandamus proceeding.

A. Sufficiency of the allegations

1. Standard of Review

" 'A demurrer tests the legal sufficiency of the complaint. [Citation.] Therefore, we review the complaint de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." [Citation.] … [¶] … It is appropriate to ' "to consider judicially noticed matters." ' [Citation.] ' "Because the trial court's determination is made as a matter of law, we review the ruling de novo." ' " (*Czajkowski, supra,* (2012) 208 Cal.App.4th at p. 173.)

2. Analysis

i. Public use and benefit

At the outset, we note the complaint alleges Kern has admitted the project was for a public use and benefit. Specifically, it was alleged Kern and Astoria agreed the project would "serve a public use and provide a public benefit," and alleged both Kern and Astoria described the project on their respective websites as a "major public project." Appellants further allege Kern stated in public documents and at a public meeting that the project was "a public use and provided a major public benefit for Kern's residents."

Aside from Kern's admission the project was for a public use and benefit, the complaint alleged obvious public benefits attributable to the project. The complaint alleged Kern "recognized" the public demand for cheaper and more reliable energy, and the project would allegedly generate energy for over 40,000 Kern County residents "on a reliable and less costly basis." The project would also "provide Kern with millions of dollars of revenue on a reliable and continuous basis" because the generated electricity could be marketed to various power utility companies. The provision of cleaner, cheaper, and more reliable energy to such a large portion of the general public is sufficient by itself for the project to be considered a public use, especially considering the public demand.

Additionally, Kern stated the project would further Kern's policy of encouraging domestic and commercial solar energy uses to conserve fossil fuel and improve air quality, and furthered Kern's goal of positioning itself as "a leader in energy production." Kern was also statutorily obligated to reduce emissions by 2020. The improvement of air quality, the satisfaction of statutory obligations, and the furtherance of Kern's goal of becoming a leader in energy production all benefit the entire general public.

As can be seen, and contrary to the trial court's order, the complaint's theory was not that the project was a public use or benefit because Kern issued permits and approvals and prepared an EIR. Rather, the complaint clearly alleges the project was a public use and benefit because it would provide cleaner, cheaper, and more reliable energy to 40,000 residents, aid in emission reduction, improve air quality, and create a continuous revenue stream for Kern, among other benefits to the public.

ii. Kern's substantial participation

To maintain an inverse condemnation action against Kern, it is insufficient for appellants to establish the project is a public use and benefit; they must also allege sufficient facts Kern substantially participated in the planning, approval, construction, or operation of the project. We conclude appellants have done so.

The trial court's order sustaining the demurrer implies that appellants have only pleaded that Kern issued permits and other approvals and prepared an EIR, and the trial court ruled these activities were insufficient to constitute substantial involvement. However, the complaint alleges Kern's participation in the project went beyond issuing permits and approvals and preparing an EIR.

In sustaining the demurrer, the trial court ruled no cause of action for inverse condemnation lies "where a complaint alleges that a public entity has only issued permits and approvals for a private development." Such a ruling implies that Kern's involvement in the project was only incidental or ministerial, and not substantial. However, the

complaint here alleged involvement in the project by Kern far greater than the mere ministerial issuance of permits and approvals.

First, the complaint alleged Kern entered into an agreement with Astoria for the construction of the project, that provided the project would be "mutually beneficial" in part because it would generate energy for 40,000 residents in a cheaper, cleaner, and more reliable manner. Kern's entering into an agreement to secure such a public benefit demonstrates its interest and participation in the project from the outset. Both the trial court and Kern have overlooked the allegation that this agreement was entered into.

Kern also allegedly granted conditional use permits, granted multiple zone changes, vacated public easements in Astoria's favor, granted Astoria private easements, and approved changes to Kern's general master plan and zoning ordinance, all of which are discretionary acts. The trial court ruled a public entity's issuance of permits and approvals for a private development is insufficient to maintain an inverse condemnation action. At the hearing on the demurrer, the trial court stated its ruling on this point was based on the holding in *Yox v. City of Whittier* (1986) 182 Cal.App.3d 347 (*Yox*). The court also ruled that neither Kern's compliance with CEQA nor Kern's adoption of the Statement of Overriding Considerations prepared in compliance with CEQA transformed the Astoria project into a public use or improvement for inverse condemnation purposes. For our analysis, it is only necessary that we analyze the trial court's first point regarding whether Kern's issuance of permits and approvals was sufficient to constitute substantial participation here.

The court's reliance on *Yox* was misplaced. In that case, plaintiffs brought an inverse condemnation suit against a city, alleging the drainage system servicing their property damaged their property. (*Yox, supra,* 182 Cal.App.3d at p. 350.) The drainage system was in a private development, and the street and pumps which made up the system "were entirely privately built and maintained and were never dedicated to or accepted by the public." (*Id.* at pp. 352–353.) The city's sole affirmative action

regarding the drainage system was the issuance of permits for it to be built. (*Id.* at p. 350, 353.)

The *Yox* court affirmed the trial court's granting of the city's motion for summary judgment on the inverse condemnation cause of action, holding:

> "Plaintiffs, however, cite no authority, nor has our research uncovered any, for holding a city liable in inverse condemnation for injury to private property within a subdivision resulting from completely private construction—privately designed, financed and built—on a private street where the city's sole affirmative action was the issuance of permits and approval of the subdivision map.
>
> "Rather, the existing law is to the contrary. *In Ellison v. City of Buenaventura* (1976) 60 Cal.App.3d 453 [(*Ellison*)], the court held that a City was not liable to a downstream property owner for sediment buildup in downstream waterways at a faster rate than would have occurred without upstream development which had been authorized by the city. The court ruled that where, as here, the city 'played no part [in the private development of the upstream property] other than [the] approval of plans and issuance of permits,' the claims for damages against the public entity were not actionable." (*Yox, supra,* 182 Cal.App.3d at p. 353.)

The relevant facts in *Yox* and *Ellison* are readily distinguishable from the facts in this case. *Yox* and *Ellison* both involved private improvements that were not public uses or benefits, and in neither case was the improvement ever dedicated to or accepted by the public entity defendant. Here, the public entity has issued permits and approvals for a project that it has admitted is a public use. The similarity between the instant case and *Yox* and *Ellison* that the trial court apparently focused on was that in all three cases the project or improvement was built by a private entity. However, the crucial distinction is, again, that in this case the project was a public use. This distinction renders *Yox* and *Ellison* inapposite.

Sheffet v. County of Los Angeles (1970) 3 Cal.App.3d 720 (*Sheffet*) is analogous to the operative facts here. In that case, plaintiff owned and resided across the street from a property located on higher and unimproved land. (*Id.* at p. 726.) A construction

company eventually commenced construction of a subdivision on the property. (*Ibid.*) "Plans for the subdivision were prepared by engineers employed by [the construction company], and were approved by defendant County." (*Ibid.*) Two one-block-long streets were contained in the plans, which upon completion were both dedicated as public highways and accepted by the defendant county " 'for all public purposes and liability attaching thereto.' " (*Ibid.*)

Prior to the construction of the subdivision in *Sheffet*, the plaintiff experienced no flow of surface water onto his property from across the street. (*Sheffet, supra,* 3 Cal.App.3d at p. 727.) After construction, various rainstorms resulted in water and mud flowing onto his property. (*Ibid.*) The plaintiff sued the county and the construction company for damages and injunction and was awarded both. (*Ibid.*) The Court of Appeal reversed in part, holding that the plaintiff's remedy against the county was inverse condemnation and not injunction. (*Id.* at pp. 731, 742–743.)

The *Sheffet* court analogized the facts there to those in *Frustruck v. City of Fairfax* (1963) 212 Cal.App.2d 345 (*Frustruck*). In *Frustruck*, "the development and improvement of higher lands resulted in an increase in the flowage of surface waters which naturally drained across plaintiff's lower property." (*Sheffet, supra,* 3 Cal.App.3d at p. 734.) The improvements diverted storm waters "in such a manner that the additional water could not be handled by the existing 20-inch culvert which ran beneath the street to a ditch located on plaintiff's property." To alleviate the flow of excess water onto the plaintiff's land, "the City enlarged the culvert carrying the waters to the plaintiff's ditch." (*Ibid.*) The court found there was an increased burden to plaintiff's property, constituting inverse condemnation. The court stated:

> " 'The liability of the City is not necessarily predicated upon the doing by it of the actual physical act of diversion. The basis of liability is its failure, in the exercise of its governmental power, to appreciate the probability that the drainage system from Marinda Oaks to the Frustruck property, functioning as deliberately conceived, and as altered and maintained by the

> diversion of waters from their normal channels, would result in some damage to private property. [Citations.] Drainage systems concern the whole community. Their construction and maintenance become a matter of public policy and are subjects of independent statute. [Citation.] They are, as here, proper subjects for the required approval by public agencies. The approval of the subdivision maps and plans which include drainage systems, as well as the approval which we are entitled to presume was given to the construction of the improvement on the church property by the City in the performance of official duty (Code Civ. Proc., § 1963, subd. 15), constitute a substantial participation incident to the serving of a public purpose. Such drainage systems when accepted and approved by the City become a public improvement and part of its system of public works. [Citation.] The fact that the work is performed by a contractor, subdivider or a private owner of property does not necessarily exonerate a public agency, if such contractor, subdivider or owner follows the plans and specifications furnished or approved by the public agency. When the work thus planned, specified and authorized results in an injury to adjacent property the liability is upon the public agency under its obligation to compensate for the damages resulting from the exercise of its governmental power.' " (*Sheffet, supra,* 3 Cal.App.3d at pp. 734–735; quoting *Frustruck, supra,* 212 Cal.App.2d at pp. 362–363.)

The *Sheffet* court concluded for the inverse condemnation issue before it with the following: "In the instant case, the defendant County is liable to the public for the same reason as expressed in *Frustruck*, upon its approval of the plans." (*Sheffet, supra,* 3 Cal.App.3d at p. 735.) Thus, the approval of plans may be sufficient to impart inverse condemnation liability on a public entity if the improvement is a public use and the public entity's participation in the improvement is substantial.

Unlike *Yox* and *Ellison*, on the one hand, *Sheffet* and *Frustruck* each involved a public entity's approval of plans regarding an improvement that was a public use. This is the critical distinction. It is also important to note neither *Sheffet* nor *Frustruck* stand for Kern's proposition that a private improvement must be dedicated to or accepted by a public entity for an inverse condemnation action to lie. While in *Sheffet* the improvements were eventually accepted by the public entity, inverse condemnation

liability arose "upon [the public entity's] approval of the plans." (*Sheffet, supra*, 3 Cal.App.3d at p. 735.)

We conclude the complaint alleges sufficient facts regarding Kern's substantial participation in the project's planning, approval, construction, or operation. Kern was substantially participating at the project's inception when it entered into an agreement with Astoria to ensure 40,000 Kern residents would be provided a cheaper, cleaner, and more reliable source of energy. Additionally, Kern's involvement in the permitting process was substantial. Kern did not merely issue ministerial permits and approvals. Rather, Kern not only entered into the Memorandum of Agreement to secure a public benefit from the project, but also approved eight conditional use permits, approved zone changes, vacated public easements in Astoria's favor, granted new easements to Astoria, and approved changes to its general master plan and zoning ordinance. These permitting activities are no less substantial than the permitting activities described in *Sheffet* and *Frustruck*. As discussed, it is also of no import that Kern has not accepted the project like the public entities in *Sheffet* and *Frustruck* accepted the improvements there.

3. Proximate Causation

Finally, the trial court ruled the complaint did not sufficiently plead facts regarding proximate causation. However, as we have explained, the trial court focused on the incorrect causal nexus, that being the nexus between Kern's permitting activities and the harm to appellants' properties. Instead, the question is whether the complaint alleges a sufficient causal nexus between the project itself and the harm to appellants' properties. (*Arreola, supra*, 99 Cal.App.4th at p. 761.) The complaint sufficiently pleaded that the project has directly resulted in a permanent glare, a diminution of scenic vistas, ongoing dust and release of toxic pollutants, a concern for potential health risks, and a substantial loss of marketability.

Kern contends that because appellants did not address in their opening brief the part of the trial court's order sustaining the demurrer regarding the proximate cause

element, appellants have forfeited their challenge to the issue. As proximate cause is a required element of appellants' inverse condemnation claim, Kern argues appellants' appeal should fail. Appellants devoted several pages of their reply to proximate causation in response to Kern's argument regarding forfeiture.

While we recognize we have the discretion to deem the proximate cause issue forfeited, we decline to do so. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.) "[B]ecause the court may decide a case on any proper points or theories, whether urged by counsel or not, there is no reason why it cannot examine the record, do its own research on the law, or accept a belated presentation." (*City of Oakland v. Hassey* (2008) 163 Cal.App.4th 1477, 1495, fn. 17.) The trial court's misapprehension of the law regarding proximate causation was readily apparent to us, and we believe to deem the proximate cause issue forfeited would therefore work an injustice in this case.

II. Mandamus proceeding not required

Kern also argues—as it did in the trial court—that appellants are foreclosed from suing Kern in inverse condemnation because appellants did not challenge Kern's approval of the project in a petition for administrative mandamus. The trial court did not rule on this argument. In any event, Kern is incorrect.

Kern cites *Rossco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642, for the proposition that when the "essential underpinning" of a plainitff's claim is the invalidity of an administrative action, failure to challenge the action by a writ of administrative mandate renders the action immune from collateral attack. (*Id.* at p. 660.) Here, appellants are not challenging the validity of the issuance of permits and approvals for the project, but instead are claiming they are entitled to compensation for the damage the project has caused to their properties. Kern's argument is thus off-base.

DISPOSITION

The judgment of dismissal is reversed and the matter is remanded for further proceedings. Appellants shall recover costs on appeal.

SNAUFFER, J.

WE CONCUR:

LEVY, Acting P.J.

POOCHIGIAN, J.